UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

MANHATTAN BEER DISTRIBUTORS LLC

and **Case No. 29-CA-115694**

JOE GARCIA DIAZ

***Matthew A. Jackson, Esq.*, for the General Counsel.**
***Allen B. Roberts and Dustin E. Stark, Esqs. (Epstein, Becker & Green, P.C.),* New York, NY, and**
***Philip S. Rantzer, Esq.,* for the Respondent.**

DECISION

Statement of the Case

STEVEN DAVIS, Administrative Law Judge: Based on a charge filed by Joe Garcia Diaz (Diaz) on October 23, 2013, a complaint was issued on December 19, 2013 against Manhattan Beer Distributors LLC (Respondent or Employer).

The complaint alleges essentially that (a) the Respondent denied Diaz' request to be represented by the Union during an investigatory interview (b) Diaz had reasonable cause to believe that the interview would result in disciplinary action being taken against him (c) Diaz refused to attend the interview without his Union representative present and (d) the Respondent discharged Diaz because he refused to attend the investigatory interview without union representation.

The Respondent's answer denied the material allegations of the complaint and on February 19, 2014, a hearing was held before me in Brooklyn, New York. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following:

Findings of Fact

I. Jurisdiction and Labor Organization Status

The Respondent, a domestic corporation having its principal office at 955 East 149th Street, Bronx, New York, and a place of business at 401 Acorn Street, Wyandanch, New York, has been engaged in the non-retail sale and distribution of beverages. During the past year, the Respondent has purchased and received at its Wyandanch, New York facility, goods and materials valued in excess of $50,000 directly from points located outside New York State. The Respondent admits and I find that it has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. The Respondent also admits and I find that Laundry Distribution and Food Service Joint Board, affiliated with Service Employees International Union (Union) has been a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. The Facts

1. Background

The Respondent, which delivers beer to retail establishments, operates a delivery operation in Wyandanch, Long Island, where it employs about 90 workers. The unit includes truck drivers and helpers.

The employees are represented by the Union which has had successive collective-bargaining agreements with the Employer. Diaz began his employment in August, 2010, and was laid off for three months in November, 2012, returning in December, 2012, or early 2013 as a driver's helper. In that capacity he helped the driver maintain the inventory of products on the truck, helped deliver the product and remained in the truck when the driver collected money from the customers.

Diaz served as a Union shop steward from 2011 to Spring, 2012. He helped employees with grievances and disciplinary actions against them by speaking to their managers, and ensured that their rights were not being violated.

Diaz did not represent any employees who were asked to take a drug test. However, he was aware that the Respondent had a drug testing policy. He signed a statement upon his hire which acknowledged that "no employee shall report to work while under the influence of such drugs. Employees who engage In such conduct will be subject to discipline up to and including discharge." In addition, he took a pre-employment drug test and a test upon his return from layoff. Prior to the latter test, he was told by his union agent that if he failed the test he would be fired.

The parties' collective-bargaining agreement provides, in relevant part, that "any employee who … is impaired by … narcotics, illegal drugs, prescription drugs absent a prescription, controlled substances … when reporting for work … is subject to immediate disciplinary action, up to and including termination of employment."

The contract further states, in relevant part, that "employees other than drivers may be tested only when there is reasonable suspicion that the employee is working or has reported to work while impaired by drugs or alcohol…."

The Respondent's director or operations, Ron Reif, testified that notwithstanding the contract's provision that the Employer has the right to right to immediately fire an employee who is impaired, the Respondent has no right to discipline the worker without first giving him an opportunity to be tested for substance abuse. He stated that "the employee has the right to be drug tested. We never take that away from an employee … "which is intended for the benefit of the employee."

2. The Events of June 8

On June 7, 2013, Diaz injured his knee and shoulder at work and that day submitted an incident report. He reported to work the following day, June 8, at 6:33 a.m. and went to the office to learn which route he would be assigned that day. The route assignments were posted on the outside of the office window.

Diaz observed that there was no assignment listed next to his name. Rather, the notation "workers compensation" appeared next to his name. He saw Roy Small, the delivery manager, inside the office, and Tony Wetherell, the facility manager, standing near Small. Diaz opened the window and asked Small why he was placed on "workers compensation," adding that he was ready to work.

Small replied that since Diaz submitted an incident report the previous night he assumed that Diaz would not be at work due to a workers compensation claim. Small added that if he intended to report to work he should have called in. According to Diaz, Small said that he would see if work was available for him.[1] During their five or six minute conversation through the open window, Diaz was about three feet away from Small.

Small is responsible for administering the Respondent's drug testing policy. He noted that safety is a top priority with the Employer since the employees work with heavy equipment, trucks and forklifts, stating that it is "crucial" that employees appear at work in an unimpaired state.

Small attended a training class on the topic of "reasonable suspicion" in December, 2011 given by the JW Rufolo Institute for Occupational Safety and Health. Small stated that the training consisted of what behaviors an employee might demonstrate if he is under the influence of drugs or alcohol. Inasmuch as he received this training, he was authorized to determine whether reasonable suspicion exists that an employee is under the influence of drugs. He stated that in making such a determination, the manager observes the employee's behavior, and if the supervisor has such reasonable suspicion, the employee is asked to submit to a drug test which is administered by a drug testing facility off site. The employee is driven to the site by a manager who waits in the waiting room.[2]

Small testified that when Diaz appeared at the driver's delivery window he "reeked of the smell of marijuana," and his eyes were glassy and bloodshot. He asked Diaz to take a drug test and Diaz refused, saying that his "rights are being violated." Small conceded that Diaz asked to speak with shop steward Joseph Gonzalez and left the office to call Gonzalez.

According to Diaz, Wetherell asked Small if he "smelled that?" Small said "yes." Wetherell asked Diaz to enter his office and Diaz did so. Wetherell asked him questions about the incident report and asked if he was feeling well, and what caused his injuries. Diaz answered, and then Wetherell asked "how are you feeling?" Diaz responded that he felt "great. I'm here to work."

Wetherell then said "have you been doing anything stupid?" Diaz asked why he was asking, and Wetherell replied "you smell a little funny." Diaz answered that he did not know what he was talking about. Diaz testified that he believed that Wetherell suspected that he smelled of marijuana. Wetherell then asked him to wait outside the office.

Diaz stated that he waited for over one hour and, seeing that other employees received their routes and left the facility, he repeatedly asked Small if he would be receiving an

[1] Small denied offering to see if he could find work for Diaz.

[2] Diaz first testified that during the return from layoff drug test, no union representative was present with him at the testing facility or in the toilet area when he produced his urine specimen. However, he later testified that a Union representative was "just outside the door."

assignment. According to Diaz, Small told him to wait or said that he was trying to find an assignment. Finally, Diaz asked Small whether he should go home. Small replied that he had a route for him but first he had to take a drug test. Small replied that the test was necessary because "you smell like marijuana." Wetherell entered the office and said that he was looking for the drug screening paperwork.

Diaz testified that he asked Wetherell why he needed to take a drug test and Wetherell replied "you smell like marijuana." Diaz testified that he told Small "I don't have a problem taking the drug test. At that point I just wanted my shop steward." Small answered that "it's a company issue now. The shop stewards have nothing to do with it." Diaz replied "I don't believe that's correct, because when I was a shop steward I had to be there for everything that was going on between workers and management." Small said "you just have to take the test."

Diaz testified that he left the office and called shop steward Joe Henry who did not answer the call. Diaz then called steward Gonzalez. Wetherell then drove up and told Diaz to enter the car to be driven to the drug testing laboratory. Diaz replied "no, without a shop steward I'm not taking the drug test." Wetherell then suggested that Diaz drive himself to the test, and that they would "finish talking there," but Diaz refused saying "not without a shop steward," adding that he had Gonzalez on the phone. Wetherell asked Diaz to have Gonzalez called him (Wetherell).

Diaz testified that in their phone conversation he told Gonzalez that he was asked to take a drug test and he told the managers that "that's fine but I need my shop steward first. I would like you to come with me or at least be present to show me the new collective-bargaining agreement." Gonzalez replied that it was his day off and he could not accompany him, and in any event, he did not have the new contract with him. According to Diaz, Gonzalez told him that if he felt "strongly enough" that his rights were being violated and he needed his representative, he should not take the test. Diaz told Gonzalez to call Wetherell.

Small testified that when Diaz returned to the office, Small asked him what Gonzalez said and Diaz answered that that was "between me and my shop steward." Small then called Gonzalez at about 7:30 a.m. and told him that Diaz smelled of marijuana and his eyes were glassy and bloodshot, adding that he would take him for a drug test since he had a reasonable suspicion that he was under the influence of marijuana. Gonzalez replied "I understand. Do what you have to do."

Small further stated that he again asked Diaz to take a drug test because he reasonably suspected him of using marijuana, warning him that if he refused, such a refusal would be considered a positive result and he could be terminated.[3] Diaz refused to take the test.

Diaz stated that he waited at the facility and a short time later, Small and Wetherell asked him what he was going to do. Diaz replied "I feel like my rights are being violated and I don't have a problem taking the test, but I want my shop steward present. Since he's not able to be present, I'm not taking the test." Small suggested that Diaz take the test and after he passed the test he could "come back, stick your nose up at us and tell us that we messed up." Diaz replied that he was "not that type of person." Small answered "do you understand by refusing to take the drug test you're going to be suspended?" Diaz said "now that you explained that, yes I

[3] Ron Reif, the Employer's director of operations, testified that it is the Employer's policy that an employee's refusal to submit to a drug test is considered a positive test which results in the employee's discharge.

understand." Diaz repeated that he did not "have a problem taking the drug test. I just don't believe you guys have grounds to do this." Small told him to clock out and go home. Diaz left at 8:24 a.m.

Small testified that during the nearly two hour period that Diaz was at the facility he observed Diaz's "reasonable suspicion" behavior. The rest of the time was consumed by the phone calls between Gonzalez, Diaz and Small.

Small could not recall Diaz saying that he would take the test but that he wanted his shop steward present. Wetherell did not testify. Ron Reif, the Respondent's director of operations who was not at the facility on June 8, testified that he was not aware that Diaz wanted Gonzalez present at the facility at that time, but Reif stated that he was aware that Diaz "requested his union representative that morning."

Three documents were completed on June 8 by Small and Wetherell:

1. An "Observed Behavior Reasonable Suspicion Record" concerning Diaz.[4] The document stated that reasonable suspicion was determined for drugs, and that the following was observed: glassy and bloodshot eyes, his appearance and clothing had an odor, and "clothing reeked of the smell of marijuana."

2. A Progressive Disciplinary Report which was also signed by steward Gonzalez. The report stated that Diaz was discharged because he "refused to go for a drug screening under the reasonable suspicion of substance abuse." It stated that Diaz reported to work under the influence of a controlled substance. Diaz's eyes were bloodshot and glassy and his uniform reeked of the smell of marijuana. Diaz was told that he must go for a drug screening because it's against Manhattan Beer's policy to have an employee working impaired in the trade delivering beer to customers or operating equipment impaired and under the influence of narcotics.

3. A memo signed by Wetherell, Small and steward Gonzalez, which stated the following, under the heading "Termination of employment":

> - Refused to go for drug testing under the reasonable suspicion of substance abuse.
> - On Saturday, June 8, 2013, driver's helper Joe Garcia Diaz reported to work at 6:33 a.m. under the influence of a controlled substance. Facility Manager Tony Wetherell and I, Delivery Manager Roy Small were both present in the delivery office when Joe Garcia Diaz had his upper torso peering through the delivery window asking what route he was assigned to. I walked over to the delivery window to speak with Joe Garcia Diaz and I noticed that his eyes were bloodshot and glassy and his uniform reeked of the smell of marijuana.
> - I reached out to shop steward Joseph Gonzalez via

[4] The form stated that "according to 49 CFR Sec. 382.307, Reasonable Suspicion Testing, the employer shall require the driver to submit to a controlled substance … test if a supervisor or company official who is trained in accordance with Sec. 382.603 determines that reasonable suspicion exists.

telephone to explain to him that Joe Garcia Diaz reported to work under the influence of a controlled substance and that he will be taken for a drug screening under the reasonable suspicion of substance abuse.

- As stated in the Collective Bargaining Agreement: Article 39: Substance Abuse and Testing 39.1: An Employer and the Union recognize that employee drug and alcohol abuse may have an adverse impact on, among other things, the general health, welfare and safety of employees and the employer's operation.
- Joe Garcia Diaz was then brought into the delivery office and told he had to go for a drug screening under the reasonable suspicion of substance abuse. Joe Garcia Diaz refused, therefore he has been terminated.

On June 12, Reif sent an email to certain Union officials which stated that Diaz was discharged for "his refusal to submit to substance abuse testing based on reasonable suspicion."

On June 11, Diaz took a drug test administered by his physician. The test was negative. On June 20, a grievance meeting was held. Diaz stated that at that meeting Union representatives presented a copy of that test to representatives of the Employer. Director of Operations Reif, who was at that meeting, testified that he did not recall the June 11 drug test being discussed, nor was it mentioned in the minutes of the meeting. Small testified here that marijuana remains within the body for three months.

The grievance was denied.

Diaz applied for unemployment insurance and a hearing was held. In a decision issued in September, 2013, the administrative law judge found that after being asked to take a drug test Diaz "conferred with his union representative and was not told to refuse the test." The judge further found that Diaz "contends that he refused to submit to the drug screening because he believed it was intrusive." She held that Diaz was discharged for misconduct – refusing to submit to a drug screening.

Discharges of Other Employees

The Respondent presented evidence of three employees who were discharged for refusing to submit to substance abuse or alcohol testing.

In August, 2010, employee John Reyes refused to submit to a post-vehicle accident substance abuse testing and was discharged. In November, 2010, employee Greg Irving was discharged for refusing to submit to a reasonable suspicion substance abuse testing. In August, 2013, employee Felix Marin failed to submit to reasonable suspicion alcohol testing and was fired.[5] There was no evidence that any of the three employees asked for union representation before they were asked to submit to substance abuse testing. However, two of the workers,

[5] Pursuant to my request, complete documentation regarding the unemployment insurance decision and these discharges were filed by the Respondnet following the hearing. They have been received in evidence, over the General Counsel's objections, as Respondent's exhibits 1(a), 8(a), and 9(a).

Marin and Irving, had union representatives with them during the interview with supervisors in which they were asked to take a substance abuse test.

Analysis and Discussion

The complaint alleges that Diaz was discharged because he refused to attend an investigatory interview, which he reasonably believed would result in disciplinary action, without union representation.

In *NLRB v. Weingarten*, 420 U.S. 251 (1975), the Supreme Court approved the Board's conclusion that Section 8(a)(1) of the Act provides employees with the right to be accompanied and assisted by their union representative at meetings that the employee reasonably believes may result in disciplinary action. The employee has the right to advice and active assistance from the union representative. 420 U.S. at 260, 263.

The frirst question to be answered is whether *Weingarten* rights attached to the interview surrounding the Respondent's determination that a "reasonable suspicion" drug test was warranted.[6] In *Safeway Stores*, 303 NLRB 989, 989 (1991), the Board noted that "we do not pass on the administrative law judge's apparent conclusion that a drug test, standing alone, would constitute an investigatory interview under *Weingarten*," noting that the test was part of a wider inquiry into the dischargee's absence record – a first step in determining whether his excessive absences were due to drug use.

The Respondnet argues that *Weingarten* rights did not attach because here, unlike *Safeway,* there was no wider inquiry into Diaz' work record. The only matter under consideration was whether he was under the influence of drugs, and a drug test was ordered to resolve that issue. The Employer further argues, citing *U.S. Postal Service*, 252 NLRB 61 (1980), that since there were no "questions of an investigatory nature" and no "confrontation" between Diaz and his managers there was no investigatory interview. The Respondent asserts that the only investigation which would have taken place was a test of Diaz' urine specimen obtained in the privacy of the off-site independent laboratory.

I do not agree. The core issue is whether management's reasonable suspicion that Diaz was under the influence of drugs constituted an investigatory interview. The drug test the Respondent asked Diaz to take was an extension of, and a required part of its investigatory process to determine if he was under the influence of drugs. As credibly testified by manager Reif, the Respondent has no power to discipline an employee unless it offers him a drug test and he fails it, or if he refuses to take the test.

Where, as here, an employer insists on administering a medical test as part of an investigation into an employee's alleged misconduct, the employee has a right to consult with his union representative before consenting to take the test. *Safeway Stores, above; Systems 99*, 289 NLRB 723 (1988). Once the employee makes a valid request for representation, the burden is upon the employer to either (1) grant the request; (2) discontinue the interview; or (3) offer the employee the choice between continuing the interview unaccompanied by a representative or having no interview at all. *Washoe Medical Center*, 348 NLRB 361, 361, fn. 5, quoting *Consolidated Freightways Corporation*, 264 NLRB 541, 542 (1982).

[6] I do not express an opinion on whether *Weingarten* rights attach to a pre-employment substance abuse test or such test administered after an employee's return from layoff. Those tests are not at issue here.

In making the determination that Diaz was required to take a drug test, Small and Wetherell observed his physical condition and behavior, noting in their reports that he had glassy and bloodshot eyes, his appearance and clothing had an odor, and that his clothing reeked of the smell of marijuana.

They then questioned him, Wetherell asking whether he had been doing anything "stupid," an obvious inquiry as to whether he had been using drugs. This was, effectively, an interview within the meaning of *Weingarten*, as to which Diaz reasonably could believe that he would be subject to discipline. Diaz asked Wetherell why he was asking, and Wetherell replied that he smelled "a little funny." Diaz replied that he did not know what Wetherell was talking about although he believed that Wetherell may have suspected him of using marijuana.

In *Arlington Hospital*, 246 NLRB 992, 997 (1979), the Board held that *Weingarten* rights do not attach when the meeting between the employee and employer is solely for the purpose of informing the employee of, and acting upon, a previously made disciplinary decision. However, if the employer informs the employee of a disciplinary action and then seeks facts or evidence in support of that action or to attempts to have the employee admit his alleged wrongdoing or to sign a statement to that effect … the employee's right to union representation would attach."

Here, after Wetherell told Diaz that he smelled "a little funny," which Diaz believed was a reference to a possible odor of marijuana, Wetherell asked Diaz ""have you been doing anything stupid?" This question went beyond a simple order that Diaz take the drug test and was attempting to have Diaz admit to using drugs. Accordingly, if the order that Diaz take a drug test is considered disciplinary action, Wetherell's question whether he was doing anything stupid sought to elicit an admission from Diaz that he was under the influence of drugs. The right to union representation at that point clearly attached.

At that point in the interview, and also when the determination was made that there was reasonable suspicion that Diaz had used drugs, the interview became inextricably intertwined with the direction that Diaz submit to a drug test. Diaz' union agent could have been of aid to him in the interview in challenging the basis upon which that determination was made. The agent could have expressed his opinion that Diaz exhibited none of the manifestations of drug use observed by the managers.[7]

That is the type of assistance that the Supreme Court held was required in an investigatory interview which may result in discipline. Inasmuch as a positive drug test following the interview would result in discipline, I hold that Diaz was entitled to such representation when a determination was made that reasonable suspicion existed to require him to take a drug test.

Systems 99, above, was a case involving an employee who arrived at work in a condition in which the manager "formed the impression" that he was intoxicated. In the interview which followed, the employee was told that management believed that he was intoxicated and that he was being asked to take a sobriety test, and would be fired if he refused since the employer would presume that he was intoxicated. The employer did not believe that it could sustain a discharge simply on the testimony of management that the worker appeared to be

[7] I am aware that *Weingarten* cautioned against the transformation of an investigatory interview into an adversarial contest. 251 U.S. 263. That question need not be reached here since a union agent was not present.

intoxicated. In *Systems 99*, the judge described the meeting at which the employee was asked whether he would take the test as "confrontative in character," in which his refusal would be an admission of intoxication.

Based on those facts, the judge, affirmed by the Board, found that the employee's *Weingarten* rights attached. "Where an employee is advised by his employer – and therefore he 'reasonably believes' – that he may be disciplined if he refuses to submit to a proposed set of tests, there appears to be no reason for concluding that he should not be entitled to the services of a representative before deciding what he will do." 289 NLRB at 727

Similarly, in the instant case, Small possessed a reasonable suspicion, based on Diaz' appearance when he arrived at work, that he was under the influence of drugs. As noted above, operations manager Ron Reif, testified that, notwithstanding the contract's provision that the Employer has the right to right to immediately fire an employee who is impaired, the Respondent has no right to discipline the worker without first giving him an opportunity to be tested - "the employee has the right to be drug tested." Similarly, here, the Respondent regarded a refusal to take the test as an admission of drug use. I accordingly find that Diaz' *Weingarten* rights attached when he was ordered to take a drug test.

Diaz had the right to request union representation if he reasonably believed that he would be disciplined as a result of the interview. Here, the purpose of the interview was to direct Diaz to take a drug test. Diaz reasonably believed that he would be disciplined if he failed the test – he signed a statement upon his hire which acknowledged that employees who report to work while under the influence of drugs would be disciplined, and had been told by his union agent that if he failed a drug test upon his return from layoff he would be fired.

The Respondent disputes that Diaz requested the presence of his union representative. Diaz credibly testified that he repeatedly told Small and Wetherell that he would take the drug test but wanted his union agent present. Small could not recall Diaz saying that he would take the test but that he wanted his shop steward present. Wetherell, who was present during Diaz' requests, did not testify. The fact that Small could not recall but did not deny the repeated entreaties by Diaz to have his agent present, and that Wetherell did not testify, leads me to conclude that Diaz requested the presence of union agent Gonzalez.

As noted above, Diaz attempted to locate a union agent to represent him but none were available. He spoke with Gonzalez by phone. The Supreme Court noted the importance of the physical presence of the union agent who "is present to assist the employee, and may attempt to clarify the facts or suggest other employees who may have knowledge of them." *Weingarten*, 251 U.S. at 260. To hold that a phone call with a union agent satisfies an employee's right to union representation would make that right meaningless. "If the employer grants the request [for representation], the union representative is entitled not only to attend the investigatory interview, but to provide active advice and assistance to the employee." *Washoe Medical Center*, 348 NLRB 361, 361 (2006).

When Diaz refused to take the drug test, the Employer may have advised Diaz that it would not proceed with the interview unless he was willing to speak to the managers unaccompanied by his agent. Diaz could than have refused to participate in the interview, thereby protecting his right to representation, but at the same time relinquishing any benefit which might be derived from the interview. The employer would then be free to act on the basis of information obtained from other sources. *Weingarten*, at 259.

There would have been no harm to the Employer in delaying the interview until Diaz' representative could have attended since, according to Small, marijuana remains within the body for three months.

The Request for Reinstatement

As part of the requested remedy, the General Counsel requests that Diaz be reinstated. In *Taracorp, Inc.,* 273 NLRB 221, 222-223 (1984), the Board held that where the only violation is the denial of an employee's request for union representation pursuant to *Weingarten*, a make-whole remedy is inappropriate. The Board noted that Section 10(c) of the Act prohibits such a remedy where the employee was discharged for cause. In order to issue a make-whole remedy there must be a nexus between the *Weingarten* violation and the reason for the discharge.

When an employer takes disciplinary action against an employee for conduct that was the subject of the investigation, and not for invoking his *Weingarten* rights, the disciplinary action does not itself violate Section 8(a)(1), even when the employee's *Weingarten* rights were violated. *Taracorp*, above, at 222 ("we are unable to justify the imposition of a make-whole remedy where an employer's only violation is the denial of an employee's request for representation at an investigatory interview."); *L.A. Water Treatment*, 263 NLRB 244, 246 (1982). An employer, however, may violate the Act by disciplining the employee if that punishment resulted from the employee invoking his *Weingarten* rights. If it is found that the discipline resulted from the assertion of *Weingarten* rights, the burden is placed on the employer to prove that it would have taken the disciplinary action in the absence of the employee invoking his *Weingarten* rights. *Safeway Stores, Inc.*, above; *T. N. T. Red Star Express, Inc.*, 299 NLRB 894, 895, fn. 6 (1990).

Although I have found that Diaz requested union representation at his interview on June 8, and that the Respondent unlawfully denied that request, I find that the sole reason for his discharge was his refusal to submit to a drug test. I cannot find that he was discharged for refusing to submit to a drug test without his union representative being present.

The General Counsel argues that his refusal to take the test was premised upon the Respondent's denial of his *Weingarten* right to have union representation. That may be, but the question is the reason for the discharge as set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980). Applying the *Wright Line* test, I find that Diaz' discharge did not violate the Act. First, the General Counsel must establish that Diaz has engaged in protected concerted activity and that animus against that conduct was a motivating factor in the decision to discharge him. If that showing is made, the violation is proven unless the Respondent proves that it would have disciplined him even in the absence of his protected conduct. Here, the General Counsel has not met his initial burden.

I first find that Diaz engaged in protected concerted activity by requesting union representation when he reasonably believed that discipline would result. However, it has not been proven that the Respondent bore animus against such protected activity in discharging him. *Barnard College*, 340 NLRB 934, 935-936 (2003).

All the documents prepared by the Respondent at the time of his discharge recite that he was fired for refusing to take the test. There is no evidence that he was discharged because he refused to submit to the test without his union representative being present. As credibly testified by manager Reif, the Respondent's policy is that a refusal to take a drug test is considered a positive result in such a test. The purpose of the test is to confirm or rebut the reasonable suspicion entertained by the managers. If the employee refuses to take the test, the

Respondent reasonably concludes that the test would be positive. Indeed, Diaz conceded that Small told him that he would be suspended if he refused to take the test.

I find that Diaz' refusal to take the test and the belief of the Respondent's managers, based on their observations that they possessed reasonable suspicion that Diaz was under the influence of drugs, were the events which resulted in his termination, not his insistence on his *Weingarten* rights. I conclude that the General Counsel has failed to establish a sufficient nexus between the denial of Diaz' *Weingarten* rights and his discharge. I conclude that the Respondent did not violate Section 8(a)(1) of the Act by terminating Diaz. *Systems 99; Taracorp,* above.

Conclusions of Law

1.The Respondent, Manhattan Beer Distributors LLC, is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Laundry Distribution and Food Service Joint Board, affiliated with Service Employees International Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. By denying Joe Garcia Diaz his right to union representation at an investigatory interview in which he reasonably believed that discipline may result, and by directing him to immediately submit to a drug test as part of its investigation into his behavior, notwithstanding his request to obtain union representation prior to the test, the Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) of the Act.

4.The Respondent did not violate the Act by discharging Diaz on June 8, because of his refusal to submit to a drug test without first consulting with his union representative.

The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The Respondent, Manhattan Beer Distributors LLC, Bronx, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Denying Joe Garcia Diaz or any employee his or her right to union representation at an investigatory interview in which he reasonably believed that discipline may result, and by

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

directing him to immediately submit to a drug test as part of its investigation into his behavior, notwithstanding his request to obtain union representation prior to the test.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in the Bronx, New York, and its place of business in Wyandanch, New York, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 8, 2013.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. May 15, 2014

_____
Steven Davis
Administrative Law Judge

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT deny your right to union representation at an investigatory interview in which you reasonably believe that discipline may result.

WE WILL NOT direct you to immediately submit to a substance abuse test as part of our investigation into your behavior, notwithstanding your request to obtain union representation prior to the test.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights guaranteed by Section 7 of the Act.

MANHATTAN BEEER LLC
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Two MetroTech Center, 100 Myrtle Avenue, 5th Floor
Brooklyn, New York 11201-4201
Hours: 9 a.m. to 5:30 p.m.
718-330-7713.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/29-CA-115694 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 718-330-2862